1998

Rosemarie Smith (nee Anderson) v. Kevin Lamont Smith : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

450 S. State St., PO Box 140230, Salt Lake City, Utah 84114-0210

ROSEMARIE SMITH (née Anderson),	
Plaintiff/Appellant,	
	Case No. 98-1797-CA
vs.	
KEVIN LAMONT SMITH,	PRIORITY 4
Defendant/Respondent.	

REPLY OF APPELLANT

Appeal from Order concerning custody and partial termination of parental rights, Judge Frederick presiding.

Oral Argument Requested — Priority 4

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ARGUMENT

Appellee's "Summary of Argument" at page 23 of Appellee's Brief states that:

> The trial court is afforded broad discretion in handling discovery issues. It can order that no discovery be had or that discovery be conducted on a limited basis. In this case, the Appellant had the ability to secure the documents and information she claims she needed simply by taking the deposition of the court appointed independent custody evaluator. She failed to do so. That failure cannot in any way equate to a claim of error on the part of the trial court. [Emphasis added.]

Appellee's "Argument" at page 23 of Appellee's Brief states that:

> Both the children's therapist and their guardian ad litem felt that disclosure of all of the information which fell within the ambit of the [discovery] request could have damaging effects on the children, if disclosed, and subsequently unscrupulously used. Each filed an affidavit to that effect and the father filed a Motion for Protective Order.

REPLY

SYNOPSIS OF ARGUMENT

This case is one of careful concealment of data, investigations, out of court statements, and specific mental defect allegations upon which Appellant was accused of constituting an immediate and specific danger to her children. Such allegations are false and concealment of all underlying data upon which such allegations were based is a fundamental violation of Appellant's rights.

Appellant attempted discovery of the underlying data on several occasions.

The Brief of Appellant, "Statement of Facts," paragraph 36, states that on December 30, 1997, a Request for Production of Documents was served upon both opposing counsel and the Guardian ad Litem, requesting the following:

> all medical, psychological, social work summaries, reports, synopsis of any document received from any source, ...
>
> all of your communications from to or by or between you and Primary Children's Medical Center or any of its officers, agents or employees, ...
>
> all of your communications by or between you and the office of Guardian ad Litem.

In response to that Request both the opposing counsel and the Guardian ad Litem stated that, "We don't have any." [Emphasis added.] See paragraphs 43, 44, and 46 of Brief of Appellant "Statement of Facts." Appellant's Statement of Facts as to that question was not disputed.

Quoted again, at page 26, the Brief of Appellee states that:

> Both the children's therapist and their Guardian ad Litem felt that disclosure of all of the information which fell within the ambit of the request could have damaging effects on the children, if disclosed, and subsequently unscrupulously used. Each filed an affidavit to that effect.

REPLY TO APPELLEE'S BRIEF

POINT 1

A total discovery lockout cannot be maintained upon nothing more than an unsupported claim that discovery may not be helpful or in the interests of children.

The question now before the Court of Appeals is may opposing counsel, by providing partial, insufficient, concealed, misleading and false information to the Court obtain an Order totally preventing discovery of information upon which the Appellant was accused?

If neither Guardian ad Litem nor Appellee never had "any communications" with any employee or agent at IHC, how is it possible for Appellee's counsel to prepare

affidavits for both the IHC Social Worker and an Affidavit for the Guardian ad Litem stating that,

> 6. It is my legal and professional opinion, that it would not be in the children's best interest to release these medical records at this time. Furthermore, I do not believe the release of these records would be helpful.
>
> 7. I absolutely believe a Protective Order should enter preventing the release of these records in the release of the records (sic) at this time could be harmful to the children by causing past issues to have to be relived. (See Record, pages 761 et seq.)

Appellant's Request for Production of Documents was not for information or documents that may constitute or consist of the "work-product" of the office of Guardian ad Litem. The question was—What documents and communications had you had, do you have now or have you seen from the IHC Social Worker, Ms. Hardman, or other members of the IHC "Child Protection Team?"

Given the response from both Guardian ad Litem and from Appellee and his counsel that, "We don't have any."; how is it possible to prepare and execute an Affidavit as to date, records and documents that one has never seen, heard of or know any of the contents thereof?

POINT 2

Affidavits that make nothing more than conclusionary statements of "experts" or guardian ad litem are not sufficient.

At a minimum, such a result violates the principles set forth by Mr. Justice Zimmerman in *Butterfield v. Okubo*, 831 P.2d 97 (Utah 1992). Even in an affidavit of an expert, giving an expert opinion, the affidavit is insufficient when only conclusionary in nature. The affidavits were fundamentally flawed and infirm. The Protective Order prohibiting discovery was improperly obtained.

Under *Butterfield v. Okubo*, it was established that, "Utah is not alone in requiring experts' affidavits to include supporting factual basis for their opinions."

In the present case the question of why could never be asked. Why is release of any data damaging to the children? Why should Appellant and other medical experts be prohibited from review of the data upon which Appellant stands accused? Why?

The unsupported conclusion of any expert standing alone on concealed data is not sufficient to find an accused at fault in a court of law. Why? Because the result is the establishment of a court of star-chamber and conviction based upon secret affidavit and report of undisclosed out of court declarants not subject to review.

POINT 3

Appellee's retort that Appellant is at fault for not taking the formal deposition of Dr. Gully is without merit.

How can the deposition be taken of a medical professional when no records are available and none may be produced in response to the deposition notice? Stated in another manner—When a protective order has been issued prohibiting an expert from producing or disclosing any data upon which his or her opinion is based—How is it possible to conduct the deposition? Any Notice of Deposition *Duces Tecum* is prohibited by a broad and unlimited protective order.

The Protective Order obtained by opposing counsel from the trial court prohibited the release of any and all information—all records, interviews, accusations, data, and documents—upon which the court-appointed expert based his opinion. The exceptionally broad and unlimited Protective Order effectively disabled the Appellant's attempts to meet and confront her accusers.

Under the provisions of Rule 706(a), "Court-appointed experts," deals hopefully with the appointment of independent experts. Please note that the Protective Order in question was prepared by opposing counsel, prohibiting access to any data underlying the court-appointed expert's opinion.

One may not have the whole pie. One may not have the cake and eat it too. One may not consume both the whole pie and the cake and then obtain a Protective Order to conceal the crumbs. In this present matter a Protective Order was issued and upheld by the trial court. That Protective Order effectively prohibited discovery. That Protective Order was obtained on nothing more than release of any records would be damaging to the children. Based upon that, opposing counsel used the Protective Order to prohibit discovery of any kind and to greatly accelerate the rising cost. Greatly accelerating the cost is another strategy of prohibition of discovery—a very effective strategy.

Suppose that a Notice had been issued to take the deposition of the only person in possession of the medical records of this case. How does one even commence to ask questions?

Question? Was the client sick?

Answer Yes.

Question? What data did you rely upon in making that diagnosis?

OBJECTION - Opposing Counsel - The court's Protective Order prevents disclosure of any underlying data!

Whereupon the deposition terminated.

Therein lies this entire case. May a person be accused and found at fault by independent interviews of witnesses outside of the trial court, having no access to the information or data provided or available to the out-of-court interviewer?

In this present case the veracity of all information provided to the single appointed expert, prohibited that data being provided to anyone else. The improperly obtained Protective Order and expansion of that Order to include all information upon which the Appellant stood accused constituted a violation of Appellant's rights and constituted reversible error.

Appellant was prevented from and prohibited from preparing for trial. No competent medical expert, whether retained by the Appellant or not, would give an

opinion without access to the medical records available. In this case the Protective Order prohibited any medical history or present data from being available to any other medical provider, psychologist, psychological team or psychiatrists.

However the trial court was persuaded to get there, the result violates fundamental rights of freedom, due process, right to confront accusers, all the basic principles upon which the laws of this exceptional nation stands.

CONCLUSION

Even the trial court itself finally had to acknowledge that no argument could be maintained against having Dr. Rindflesh review of all information under the terms and conditions suggested.

Similarly, the previously issued orders, which prohibited access to Rosie, her counsel, and her psychologists, were likewise indefensible. But even the apparent deference of the trial court toward the "protection of children" put forth in Appellant's arguments the trial court had to finally give way to the recognition that its actions could not support the denial of Rosie's Motion in Limine.

Surprisingly, on the morning of trial, the trial court's order, given just five (5) working days earlier, was seen as a sham. Reasonable time to comply with the trial court's order was denied. The trial was forced forward.

Permitting Dr. Mark A. Rindflesh, MD, an eminent psychiatrist, to review the present matter would have given the trial court an exceptional opportunity to bring the best evidence and expertise available. The *Vitae* and Affidavits of Dr. Rindflesh are a matter of record.

Dr. Rindflesh is presently a member of the University of Utah Neuropsychiatric Institute. Having graduated from the University of Utah School of Medicine in 1973, his postgraduate training included a Residency in Child Psychiatry, and a General Psychiatry Residency. He has both clinical and forensic experience, and has provided professional advice and consultation to the Utah judiciary in the past.

A total denial of discovery and direct and intentional failure to permit access to any of the underlying data upon which Appellant was accused constitutes reversible error, violates the Utah Rules of Civil Procedure, the Utah Rules of Evidence, is a denial of Due Process and places the motives, intent and purpose of the trial court and its judges in question.

RELIEF SOUGHT

WHEREFORE, Appellant seeks relief as follows:

1. Reverse and remand, establishing the status quo between the parties which existed between the parties before Appellee filed his petition for modification of the original divorce decree;

2. An order that Appellant and/or her counsel and medical advisors have access to all records of any kind and nature related to this matter, including but not limited to all IHC information, documents, and data (to be broadly interpreted as set forth in the unanswered Request for Production directed to both Appellee and the office of Guardian ad Litem.);

3. Specifically directing that Appellant's counsel, her psychologists and psychiatrist have unlimited access to all IHC records which are in any manner related to Appellant, Appellee or their children;

4. Specifically directing that Appellant's counsel, her psychologists and psychiatrist have unlimited access to all records of Guardian ad Litem which are in any manner related to Appellant, Appellee or her children, the only exception being such matters as the Guardian ad Litem may clearly establish as its own independent work product, full disclosure of what such work product may constitute, and disclosure to the trial court of a detailed statement of why such must remain secret and undisclosed;

5. That the trial court assign the cases to other judges for further disposition; and

6. Such other and further relief as the court may deem appropriate.

DATED: this 22nd day of June 1999.

MARTIN & NELSON, PC
Counsel for Appellant

By: _____
Loren D. Martin
Attorney at Law

PROOF OF SERVICE

I hereby certify that the foregoing REPLY OF APPELLANT was placed in the US Mail, postage prepaid on the 22nd day of June, 1999 to the following:

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